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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION  
11

12 KEVON DESHAUN MOSES,

13 Petitioner,

14 v.

15 K. CLARK, Warden,

16 Respondent.  
17

No. CV 18-8795-CJC (PLA)

**ORDER TO SHOW CAUSE RE: DISMISSAL  
OF HABEAS PETITION FOR FAILURE TO  
EXHAUST CLAIMS AND/OR AS TIME  
BARRED**

18 Kevon Deshaun Moses (“petitioner”) initiated this action on October 8, 2018, by  
19 constructively filing a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant  
20 to 28 U.S.C. § 2254 (“Petition” or “Pet.”). The Petition challenges his September 15, 2015,  
21 conviction, pursuant to a no contest plea, in the San Luis Obispo County Superior Court, case  
22 number 14C-48655, for assault with force likely to produce great bodily injury (Cal. Penal Code  
23 § 245(a)(4)), and an enhancement based on a prior prison term (Cal. Penal Code § 667.5(b)).  
24 (Pet. at 42 (“Felony Abstract of Judgment”)). Petitioner appealed his conviction (Pet. at 70-79),  
25 and on July 14, 2016, the California Court of Appeal denied that petition. See  
26 <http://appellatecases.courtinfo.ca.gov> (last visited Oct. 18, 2018). Petitioner has presented no  
27 evidence that he has raised his claims to the California Supreme Court and a search of the  
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1 California Supreme Court's website also reflects that petitioner has not filed either a petition for  
2 review or a habeas petition in that court. Id.

### 3 4 **A. EXHAUSTION**

5 As a matter of comity, a federal court will not entertain a habeas corpus petition unless the  
6 petitioner has exhausted the available state judicial remedies on every ground presented in the  
7 petition. Rose v. Lundy, 455 U.S. 509, 518-22, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). The  
8 habeas statute explicitly provides that a habeas petition brought by a person in state custody "shall  
9 not be granted unless it appears that -- (A) the applicant has exhausted the remedies available  
10 in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii)  
11 circumstances exist that render such process ineffective to protect the rights of the applicant." 28  
12 U.S.C. § 2254(b)(1). Moreover, if the exhaustion requirement is to be waived, it must be waived  
13 expressly by the state, through counsel. See 28 U.S.C. § 2254(b)(3).

14 Exhaustion requires that petitioner's contentions be fairly presented to the *state* supreme  
15 court even if that court's review is discretionary. O'Sullivan v. Boerckel, 526 U.S. 838, 845-47, 119  
16 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); James v. Giles, 221 F.3d 1074, 1077, n.3 (9th Cir. 2000).  
17 Petitioner must give the state courts "one full opportunity to resolve any constitutional issues by  
18 invoking one complete round of the State's established appellate review process" in order to  
19 exhaust his claims. O'Sullivan, 526 U.S. at 845. A claim has not been fairly presented unless the  
20 prisoner has described in the state court proceedings both the operative facts and the federal legal  
21 theory on which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S. Ct. 887,  
22 130 L. Ed. 2d 865 (1995); Picard v. Connor, 404 U.S. 270, 275-78, 92 S. Ct. 509, 30 L. Ed. 2d 438  
23 (1971); Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996); Bland v. Cal. Dep't of Corr., 20 F.3d  
24 1469, 1473 (9th Cir. 1994), overruled on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir.  
25 2000). State remedies are not exhausted if an appeal or petition for post-conviction relief is still  
26 pending in state court. Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983) (if petitioner has  
27 a pending state appeal, he "must await the outcome of his appeal before his state remedies are  
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1 exhausted”); Schnepp v. Oregon, 333 F.2d 288, 288 (9th Cir. 1964) (per curiam) (state remedies  
2 are unexhausted where a petition for post-conviction relief is still pending in state court). Petitioner  
3 has the burden of demonstrating that he has exhausted available state remedies. See, e.g.,  
4 Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

5 Here, the state court website reflects that petitioner has not fairly presented his claims on  
6 direct appeal or in a habeas petition to the California Supreme Court. Petitioner also admits that  
7 he has not exhausted his state judicial remedies in the California Supreme Court. (See Pet. at 2-  
8 3. 5). As the Petition, therefore, appears to be unexhausted, it is subject to being dismissed  
9 without prejudice. Greenawalt v. Stewart, 105 F.3d 1268, 1271, 1273-75 (9th Cir. 1997).

## 10 11 **B. STATUTE OF LIMITATIONS**

12 The Petition is subject to the Antiterrorism and Effective Death Penalty Act of 1996  
13 (“AEDPA”) one-year statute of limitations period, as set forth under 28 U.S.C. § 2244(d). See  
14 Calderon v. U.S. Dist. Ct. (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997).<sup>1</sup> In most cases, the  
15 limitation period begins to run from “the date on which the judgment became final by conclusion  
16 of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

17 As stated above, petitioner was convicted on September 17, 2015. Direct review in  
18 petitioner’s case proceeded only before the California Court of Appeal, which affirmed petitioner’s  
19 conviction on July 14, 2016. Petitioner did not file a petition for review in the California Supreme  
20 Court. Accordingly, his conviction became final on August 23, 2016, forty days after the court of  
21 appeal confirmed his conviction. See Cal. R. Ct. 8.264(b)(1), 8.500(e)(1); see also Smith v.  
22 Duncan, 297 F.3d 809, 812-13 (9th Cir. 2002). Therefore, petitioner had until August 23, 2017,  
23 to file a timely federal petition. 28 U.S.C. § 2244(d)(1)(A). Petitioner, however, constructively filed  
24 the present action on October 8, 2018, more than a year later. On its face, therefore, it appears  
25 that the Petition is barred by the statute of limitations.

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27 <sup>1</sup> Beeler was overruled on other grounds in Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530,  
28 540 (9th Cir. 1998) (en banc).

1 **C. CONCLUSION**

2 Based on the foregoing, petitioner is **ordered to show cause** (1) why the Petition should  
3 not be dismissed as unexhausted; and (2) why the Petition should not be dismissed as barred by  
4 the statute of limitations.

5 Specifically, **no later than November 8, 2018**, petitioner must submit to the Court a  
6 response making clear his arguments, if any, as to (1) why the Petition should not be dismissed  
7 as unexhausted; and (2) why the Petition should not be dismissed as barred by the statute of  
8 limitations. All facts relied upon by petitioner must be proved by testimony contained in a  
9 declaration signed under penalty of perjury pursuant to 28 U.S.C. § 1746, or in properly  
10 authenticated documents. Petitioner must also include proof that the claims for relief set forth in  
11 the instant Petition, **and the federal basis for those claims**, have previously been presented to  
12 the California **Supreme** Court, by providing this Court with a complete copy of either the petition  
13 for review or state habeas petition raising those claims to the California Supreme Court.

14 Alternatively, if petitioner agrees that the Petition should be dismissed without prejudice as  
15 unexhausted and/or as barred by the statute of limitations, he may file a notice of voluntary  
16 dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1) ("Rule 41"). Rule 41 allows for the  
17 voluntary dismissal of an action by a petitioner<sup>2</sup> without prejudice and without a court order before  
18 the opposing party serves either an answer or a motion for summary judgment. Fed. R. Civ. P.  
19 41(a)(1); Hamilton v. Shearson-Lehman Am. Express, Inc., 813 F.2d 1532, 1534 (9th Cir. 1987).  
20 Respondent has not yet appeared in this action. The Court clerk is directed to send petitioner a

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22 <sup>2</sup> Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts  
23 provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent  
24 with any statutory provisions or these rules, may be applied to a proceeding under these rules."  
25 See also Hilton v. Braunskill, 481 U.S. 770, 776 & n.5 (1987) (Federal Rules of Civil Procedure  
26 may be applied to habeas petitions so long as they are not inconsistent with the Rules Governing  
27 Section 2254 Cases). The Rules Governing Section 2254 Cases do not contain a specific  
28 provision addressing voluntary dismissals. See Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir.  
1993) (applying Rule 41 to a petitioner's request for voluntary dismissal of his habeas petition);  
Williams v. Clarke, 82 F.3d 270, 273 (8th Cir. 1996) ("a Rule 41(a)(1) voluntary dismissal is both  
appropriate and consistent with the rules governing habeas cases"); Woods v. Knowles, 2003 WL  
21767470, at \*1 (N.D. Cal. July 23, 2003). Thus, Rule 41, which otherwise governs such  
dismissals, is applicable to this habeas action.

1 copy of a blank Central District form titled "Notice of Dismissal Pursuant to Federal Rules of Civil  
2 Procedure 41(a) or (c)" along with this Order to Show Cause.

3 **Failure to respond by November 8, 2018, will result in the Petition being summarily**  
4 **dismissed as unexhausted, and/or time barred, and/or for failure to prosecute and follow**  
5 **court orders.**

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7 DATED: October 18, 2018

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PAUL L. ABRAMS  
UNITED STATES MAGISTRATE JUDGE